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Supreme Court, U.S.
FILED
JUL 29 2004
OFFICE OF THE CLERK

No. 03-1274

In The

Supreme Court of the United States

JUANITA SWEDENBURG, *et al.*,

Petitioners,

v.

EDWARD D. KELLY, *et al.*,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

BRIEF OF MILLBROOK VINEYARDS & WINERY AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

ROBERT S. GETMAN
359 West 29th Street
New York, NY 10001
(212) 594-6732

Counsel for Amicus Curiae

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

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INTEREST OF THE *AMICUS CURIAE*[1]

Millbrook Vineyards & Winery (hereinafter "Millbrook"), appearing as *Amicus Curiae* herein, is an award-winning small winery located in the Hudson River region of New York State. Millbrook is duly licensed as a commercial winery in New York State. Millbrook's wines have received high acclaim but because of its limited production, Millbrook has found it difficult to achieve national distribution. Millbrook is interested in selling, and directly shipping its fine wines to out-of-state wine-lovers, many of whom have visited the winery and desire to purchase them through direct orders by mail, telephone and the internet, as customers from New York do all year long. Millbrook has advocated open direct shipping for many years. In addition, if New York opened direct shipping to non-New York wineries, then, through reciprocity provisions in other states, Millbrook would be able to direct ship to such other states.

SUMMARY OF THE ARGUMENT

Respectfully, we contend that the Second Circuit felt unduly constrained in concluding that its analysis should not substantively consider the actual discriminatory impact on non-New York wineries, compared to New York

[1] Pursuant to United States Supreme Court Rule 37, counsel of record has filed letters with the Clerk of Court consenting to the filing of this brief. In conformity with Supreme Court Rule 37.6, *Amicus* states that counsel for a party did not author this brief in whole or in part and that no persons or entities other than *Amicus*, its members and its counsel made a monetary contribution to the preparation and submission of the brief.

wineries, of New York's statutory scheme. We submit this Brief to detail those real-world discriminations, which the Court below hinted at but felt constrained to disregard, discriminations which ineluctably flow from the statute's differential treatment of in-state and out-of-state wineries. We also seek to illuminate the concrete obstacles to commerce by out-of-state wineries imposed by the innocuous-sounding abstract "physical presence" requirement articulated below.

New York statutes require non-New York wineries to double-ship wine, first shipping to a New York consignee and then from that consignee to the consumer; if that costly burden were not enough, the law places other material delivery restrictions on non-New York wineries only. The aforementioned consignee must not only be licensed, but also meet a host of significant and costly requirements the Court below blithely summarized as "physical presence." Further, palpable clouds hover over any potential market opening for non-New York wineries because they are apparently barred from credit card transactions so commonplace in every other area of modern commerce. In contrast to these burdens on non-New York wineries, New York wineries are favored with a plethora of special privileges, only one of which was focused on by the Court below.

Even allowing for the 21st Amendment's grant of authority to states, the same powerful reasons for this Court's traditional "strict scrutiny" of discriminations against out-of-staters that apply in other cases, such as the material fact that out-of-staters cannot vote in New York and cannot thereby restrain impolitic legislation,

should apply in this case.[2] The synergistic impact of the discriminations herein is conspicuous, and if Constitutional analysis may simply ignore them, all fifty States could then impose restrictions similar to New York's with impunity, multiplying these obstacles to free National commerce fifty-fold.[3]

ARGUMENT

"Commerce among the States is not a technical legal conception, but a practical one, drawn from the course of business." *Swift & Co. v. United States*, 196 U.S. 375, 398-99 (1905) (unanimous opinion, by Holmes, J.)[4]

Preface

We submit that the Second Circuit's analysis below mistakenly assumed that it was immaterial whether New York's statutory regime in fact made it impossible for out-of-state wineries to comply and be able to ship wine to willing New York consumers. Discriminations in interstate commerce can no more be an "ivory tower" notion than Commerce can be. The Circuit's "ivory tower" approach to

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[2] *See* note 12 *infra*.

[3] Practicalities of selling in every state aside, a winery has a right to sell its wine in all fifty states on the same terms as wineries in those states, and it cannot be assumed that there are not wineries that would sell in all fifty states if given a non-discriminatory opportunity. As the Second Circuit noted, "In 2000, there were over 2,100 wineries in the country, a 275% increase since 1975." *Swedenburg*, *supra*, 358 F. 3d at 239 (2d Cir. 2004).

[4] *See also United States v. Lopez*, 514 U.S. 549, 572 (1995) (concurring opinion).

the Constitutional question is exemplified by the observation that:

> Appellees did present some evidence of a general nature with regard to projected costs that an out-of-state winery would incur in obtaining a New York license. They argue those projected costs justify their decision not to pursue a New York license. We find those projections to be of little use, and they are certainly not determinative. Appellees do not contend the requirements for licensing are somehow arbitrary or unrelated to the state's desire to regulate the industry. They simply argue the costs are too high to warrant entry into the market.

Swedenburg v. Kelly, 358 F. 3d 223, 238 n.12 (2d Cir. 2004). But it is puzzling how the Circuit could actually find that while New York's statutory regime impinges upon out-of-state wineries, the "scheme does so in a non-discriminatory manner" *id.* at 239, while eschewing the need or even propriety of examining the specific real-world discrimination. We respectfully submit that it is a puzzle without a satisfactory answer in the opinion below. Could such a scheme be constitutional if in fact its burdens and costs were too high for any actual out-of-state winery to enter the market? Is it not telltale that the State's own affiant, State Liquor Authority General Counsel McKeon (hereinafter "McKeon") conceded that, in fact, *no* out-of-state winery has *ever* applied for a winery license (McKeon Aff. ¶43), the very license which the Second Circuit assumed would promptly issue and solve the petitioners' problems as long as they just had a "physical presence" in New York? (Joint Appendix in Case #03-1274 at 159-60) (hereinafter "J.A.")

Amicus therefore submits this Brief to give this Court some idea of the actual hurdles interposed between citizens of the forty-nine other States of the Union who wish to sell wine to citizens of the State of New York who wish to buy that wine. *Amicus* urges this Court to reject the notion the real-world magnitude of discrimination between citizens of different States does not matter to the law and is not worthy of examination. We respectfully submit that it is untenable to hold, as the opinion below in effect did, that any burden on interstate commerce, no matter how heavy its practical effect in discriminating between citizens of different States who seek to engage in it, is sanctioned merely by reference to the 21st Amendment and a generalized "desire" of a State to "regulate" the wine industry, so long as there is a theoretical basis to conclude that out-of-state wineries may in some manner compete, *however unequally*, with local businesses. Such an argument, if accepted, would eviscerate the central principle of the Union created by our Constitution supplanting the Articles of Confederation.

Such a purpose was surely not intended even by the drafters of the 21st Amendment, let alone by the Founding Fathers. For:

> Unquestionably one of the great advantages anticipated from the grant to Congress of power over commerce was that state interference with trade, which had become a source of sharp discontent under the Articles of Confederation, would thereby be brought to an end. As [Daniel] Webster stated in his argument for appellant in *Gibbons v. Ogden*: "The prevailing motive was to regulate commerce; to rescue it from the embarrassing and destructive consequences, resulting from the legislation of so many different States,

> and to place it under the protection of a uniform law."

The Constitution of the United States of America: Annotated, Analysis and Interpretation, Senate Document No. 99-16 at 200 (2002 ed.).

We respectfully submit that the Constitution was never meant to be blind to the facts of life, and our Courts are not required, in construing it, to blind themselves to commercial and other realities that the citizens who live under the Constitution necessarily must live with. "We the People of the United States, in Order to form a more perfect Union" are the very first words of the Constitution, after all, followed soon after by the aims to "promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity." The point was to enable freedom and enhance the citizens' lives, promote the general welfare of the entire nation and not just favored grantees of State-conferred monopolies, and not to enhance the powers of particular State governments or State regulators.

Nor is it irrelevant that the expansive interpretation of the scope of the national concern with interstate commerce has loomed large in the history of Congressional legislation and the decisions of this Court. Especially in an "Internet Age" of almost instantaneous worldwide commerce, in which the cliché that the "world is shrinking" is repeated more and more often, it must be recognized that the avenues of interstate commerce are wider today, offering more possibilities for the free trade of citizens, than the Founders could have dreamed.

Ironically, the Second Circuit candidly recognized some of these very facts:

> The winery plaintiffs presented *compelling proof* that boutique wineries with limited production of high quality wine have a niche in an increasingly sophisticated *national market* of wine connoisseurs. Facility of travel and the Internet have made wineries all over the nation available to those wishing to visit and buy wine – personally or in a virtual sense. Indeed, a majority in both houses of New York's legislature felt that New York wineries (the vast majority of which are quite small) would benefit from a reciprocity statute that would allow direct sales to consumers by unlicensed out-of-state wineries from states allowing New York wineries the same opportunity. See S. 3533-A, A-7411, 1995 Senate-Assembly Bill (NY 1995). The governor chose to veto the bill. *See* Governor's Veto #76 (NY 1995). Changes in marketing techniques or national consumer demand for a product do not alter the meaning of a constitutional amendment.[5]

Regrettably the Court felt that facts such as these somehow had to be excluded from its analysis. *Amicus* hopes this Court will disagree, and find instead that these facts make it especially anomalous to artificially constrain petitioners' legal and Constitutional rights with walls of economic provincialism and local protectionism.[6]

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[5] *Id.* at 239 (emphasis supplied). Hereinafter, unless otherwise indicated, all emphasis shown will be supplied.

[6] One local federal court found that the legislature had closed off competitive avenues "to prevent what was considered to be an unfair and unwise form of competition with New York state licensees, and to eliminate unfair tax advantages. . . ." *House of York v. Ring*, 322 F. Supp. 530, 533 (S.D.N.Y. 1970).

In this spirit, we offer a review of New York's regulatory regimen and its actual impact. And we must begin with the reminder that if New York's scheme is allowed to stand as a barrier to commerce, there are forty-nine other States which could enact such barriers. Any winery that wished to exercise what it believes to be its right to sell its product in any State on the same terms as that State's own citizen-wineries do, necessarily would face the potential restrictions of fifty States. Thus the types of obstacles we describe here have to be projected nearly fifty-fold before they can be fairly weighed against the 21st Amendment's concerns. And if the following recitation of the statutory and regulatory hurdles is somewhat mind-numbing, we beg the Court's indulgence but submit respectfully that it fairly reflects the harsh realities of the discrimination waiting to be inflicted upon out of state wineries trying also to thread their way through this daunting legal and regulatory maze to see if they can get a limited license and conduct commerce.

I. NEW YORK ABC LAW DISCRIMINATORILY OBSTRUCTS NON-NEW YORK WINERIES

A. An Overall Shipment Ban Weighs Upon Non-New York Wineries

Unlike the exception provisions which New York State claims might allow non-New York wineries to sell wine to New York consumers, the overall, baseline ban is crystal clear. Alcoholic Beverage Control (hereinafter "ABC") Law §102(1)(c) provides in pertinent part that:

> *No* alcoholic beverages shall be *shipped into* the state unless the same shall be *consigned to a person duly licensed* hereunder to traffic in alcoholic beverages. This prohibition shall apply to all

> shipments of alcoholic beverages into New York state and includes importation or distribution for commercial purposes, for personal use, or otherwise, and irrespective of whether such alcoholic beverages were purchased within or without the state . . . .

Id. If this were not enough, not only must any consignee be licensed in New York but ABC Law §102(1)(d) further reinforces this ban by declaring that "*No common carrier or other person* shall bring *or carry into* the state any alcoholic beverages, unless the same shall be *consigned to a person duly licensed* hereunder to traffic in alcoholic beverages. . . .," *id.* In sum, New York's borders are hermetically sealed against any commercial[7] interstate importation of wine, unless it is consigned to a licensee.

In sharp contrast, New York law permits New York wineries to truly direct-ship from their doors to New York consumers. In brief, "commercial" and "farm" wineries may obtain a retailer's license and either ship straight to consumers via common carrier (for "farm" wineries) or via their own trucks ("commercial" wineries) and even to ship other New York wineries, and may also ship "New York state labeled wine" directly to consumers. *See generally* ABC Law §§76, 76-a.

B. That Consignment Requirement Discriminatorily Bans Direct Shipment

The existence of the above consignment requirement imposed upon out-of-state wineries is crucial to this appeal

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[7] There is a limited exception for an individual personally bringing in a small quantity of wine from abroad.

because the *central premise* of the opinion below appears to be mistaken in a material respect. The court below flatly declared: "More importantly, however, a licensed winery may also obtain a retail license, allowing it to sell and ship its wines *directly* to consumers. *Id.* §§76(4), 77(2)." *Id.* at 229. But that is not quite so, as even the State's affiant, State Liquor Authority General Counsel McKeon conceded: "In the instant litigation, the plaintiffs seek to engage in a business – the direct shipment of wine from out-of-state wineries to New York consumers – which *is not allowed* under the ABC Law." McKeon Aff. ¶43, J.A. 159-60. (*See also* 2d Cir. Jt. Appx. 306-346, letters from New York indicating that direct shipment from out-of-state prohibited). At best, out-of-state wineries always have to *double-ship*, and can never rightfully direct ship under New York law.

In fact, the one court construing the question recognized that before 1970 there were some opportunities for out-of-state wineries to ship directly to New York consumers, but not since then. The court found that the legislature had closed off those avenues "to prevent what was considered to be an unfair and unwise form of competition with New York state licensees, and to eliminate unfair tax advantages. . . ." *House of York v. Ring*, 322 F. Supp. 530, 533 (S.D.N.Y. 1970). Not only is it clear that direct shipping is literally banned, but the ban was effected for protectionist reasons that should *not* be sanctioned under the Commerce clause.

For non-New York state wineries, direct shipment and home delivery to a New York consumer by mail or common carrier, in a manner in which other goods are sold and delivered in mail or internet selling are barred by these provisions. They cannot do what every New York winery

can do. And it matters not whether the out-of state winery desiring to ship is fully licensed and inspected in its own State, whose health and safety regime may be more rigorous than New York's own, nor whether the shipments flow directly from a winery, warehouse or storeroom bonded by the United States government itself.

What the Court below concluded was that the statutory scheme did not allow for even any arguable opening permitting out-of-State wineries to sell their wines in New York, unless the out-of state wineries established a "physical presence" in New York, *Swedenburg supra* at 229, and became licensed in New York. The consignment requirement quoted above guarantees that a physical presence would be indispensable. That presence requirement is a product *inter alia* of ABC Law §3(37)'s definition of "winery": a winery is "any place or premises wherein wines are manufactured from any fruit ... and also *includes a winery for the manufacture of wine in any state other than New York state and which has and maintains a branch factory, office, or storeroom within the state of New York and receives wine in this state consigned to a United States government bonded winery, warehouse or storeroom located within the state.*" *Id.* The State's affiant, McKeon, makes this same point, McKeon Aff. Note 2 at 15-16 (J.A. 159). But this physical presence and warehousing and consignment stricture does even more: it *bars direct delivery*, which in common knowledge is the method commonest by far in interstate consumer buying.

In this manner, the consignment requirement *ipso facto* discriminates against out-of-state wineries because New York wineries *by nature* have a physical presence in New York, and thus they do not need an intermediate "consignee" because they may deliver directly to New York

consumers wholly unaffected by the rigors of ABC Law §102(1)(c) and (d). If this is permissible despite the requirements of our Nation's Commerce Clause, every one of the forty-nine other states in which a winery is not a "native" citizen may bar it from direct delivery of its product.

It does not take much imagination nor volumes of elaborate proof to see the inevitable consequences of this restriction. The cost alone of maintaining one or more[8] separate consignment facilities in forty-nine other states is sure to practically prohibit smaller, "Mom and Pop" wineries from ever venturing into national commerce. And it should not be forgotten that this cost cannot simply be one of renting a bit of warehouse space, for the warehouse must be bonded and permitted (ABC Law §96), the warehouse or place of sale cannot be any available space but only one located in certain spots (*e.g.*, have a street level entrance, not located within 200 feet of a church or school, ABC Law §105(2) and (3)), records must be kept locally for inspection and full-time local staff hired and available to certify the inventory and records (McKeon Aff. ¶22, J.A. 151), and arrange the shipments or deliveries and so forth. Indeed, in order to obtain a license in New York, all wineries must *first* identify the specific premises in which the business will be operated (the "licensed premises")[9]; and

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[8] If, as the Second Circuit apparently concluded, the practical economic burdens cannot even be examined in the Constitutional analysis, what prevents a State from demanding, for example, to make inspections easier for officials or for some supposed health or other "police power" purpose, that out-of-State licensees have a consignment facility in each county?

[9] *See* ABC Law §110(1)(b) & (f); McKeon Aff. ¶20 (J.A. 151); ABC Law §105(1) ("No retail license to sell liquors and/or wines for consumption off the premises shall be granted for any premises, unless the applicant shall be the owner thereof, or shall be in possession of said

(Continued on following page)

while this requirement also applies to New York wineries, it is almost obviously not much of a burden given that they are already in New York and can use the property on which they already operate their licensed winery. In addition, the costs of simply having to maintain inventory at forty-nine or more separate locations should not be underestimated.

Even if a winery could sustain these costs, it is almost certain that they would have to be reflected in higher prices for out-of-State sales. Business costs must be paid, and the sales price is ultimately what pays them. All of these local costs, times up to forty-nine counting each State, plus the inevitable increased cost of always having to ship *twice*, once to the consignee locally and again to a consumer, obviously would put out-of-State wineries at a further competitive disadvantage to local (in this case, New York) wineries.

Finally, in contrast to these burdens, native New York wineries have available the benefit of a host of special statutory provisions, mentioned briefly above, allowing direct shipment of their wines straight to New York consumers.[10]

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premises under a lease, in writing, for a term not less than the licensed period. . . .").

[10] *See also*, ABC Law §76(4) (licenses to sell "New York state labeled" wines directly); §76(2)(a) (direct sales of "New York state labeled" wines at wine tastings); §77(5) (allowing Sunday sales by New York wineries of "New York state labeled" wines); §77(4)(b)(4) (New York wineries allowed to sell "New York state labeled" wines of other wineries); and §76(5) (New York wineries may make wine deliveries for other New York wineries).

If the score of burdens innocuously dubbed a mere "physical presence" requirement, the direct shipment ban and double-shipping requirement and all of their ramifications were not discrimination enough, there is more.

C. Added to a Burdensome "Physical Presence" Requirement Are Delivery Strictures

In addition to "physical presence" and all of its burdensome manifestations discussed above, non-New York commercial winery licensees are also subject to significant restrictions on how they must *deliver* the wine they sell, above and beyond what is demanded of New York wineries.

Under ABC Law §77(2), in order to deliver their own wine, a non-New York winery would have to obtain a retailer's certificate, because retailer licenses under §76(4) authorize a winery only to deliver "New York state labeled wines." Further, ABC law §105(8) and (9) allow retail licensees to deliver to homes of purchasers only "in vehicles owned and operated by such licensee, or hired and operated by such licensee from a trucking or transportation company registered with the liquor authority." On top of that, ABC Law §116 pertinently provides: "No alcoholic beverage shall be transported within this state by any vehicle unless such vehicle is owned and operated, or hired and operated by a licensee . . . provided, however, (a) that alcoholic beverages may be transported by a retail licensee to the home of a purchaser not to be resold by the purchaser. . . ."

Hence, non-New York wineries would be able to deliver their wines only in trucks either owned by them or hired from a trucking company licensed by the liquor

authority. *See also* McKeon Aff. ¶43 (J.A. 159-60). While this also applies to native commercial wineries in New York, they presumptively already have vehicles there, whereas the non-New York winery would have to have additional vehicles located in New York devoted solely to New York direct shipping, or they would have to hire a licensed common carrier to deliver for them. Assuming *arguendo* that this does not practically prohibit the interstate commerce the non-New York wineries seek to engage in, then perhaps the largest effect of the alleged "physical presence" requirement is to force out-of-State wineries to deliver their wines to a New York warehouse intermediate resting place first, and then drive them to the customer's home in New York-licensed trucks; surprisingly, however, this result is no different from the very three-tier distribution system which New York wineries are allowed by the law to avoid.

Is that not discrimination enough, together with all of the preceding examples synergistically spinning an impenetrable web of barriers to national commerce? Nevertheless, the New York statutory scheme has yet more obstacles and burdens to offer "foreign" wineries from other States.

D. An Extraordinary Additional Barrier Is Posed by the Ban on Credit Card Sales

We earlier referred to the commonplace method of national sales of direct shipment of a product after an interstate sales transaction conducted via mail, or telephone or "internet." There is yet another commonplace, of which this Court may take judicial notice: the prevalence of credit card sales in such interstate commerce. Few

consumers send cash through the mail, and fewer send checks than in the past. And obviously, in "internet" commerce, sales are almost exclusively done by "instant payment" offering the unparalleled convenience of electronic ordering, *i.e.*, by credit card payment or an analog of same (*e.g.*, "Pay Pal" or other electronic intermediary). Yet New York law clearly bars out-of-State wineries from using credit card sales. ABC Law §100 only allows credit card sales of wine *at the winery itself*, which, for the reasons that follow, must be interpreted to mean at a winery that is located *in* New York state itself. ABC Law §100(5) provides in pertinent part that "a winery licensee having the right to sell wine at retail for off-premises consumption may accept third party credit cards *for the sale of said beverages at the winery premises only*," *id.*

The language expressly speaks of a "sale . . . at" the winery, not "by" the winery, and reinforces that specific limitation by specifying not just "at the winery" but at the "winery *premises*." Thus any semi-legal fiction that a warehouse in New York which produces no wine might be in *some senses* a "winery," may well not stretch to include "winery premises." Indeed, that doubt is magnified by the statutory definitions of "winery." First of all, ABC Law §3(37) defines a "winery" as "any place or premises *wherein wines are manufactured* from any fruit . . . and also includes a winery for the manufacture of wine in any state other than New York state and *which* has and maintains a branch factory, office, or storeroom within the state of New York and receives wine in this state consigned to a United States government bonded winery, warehouse or storeroom located within the state." That definition includes non-New York wineries *which have* "offices" or "warehouses" in the state, thus again distinguishing

between the winery "premises" out of state and the "office" or "warehouse" in the state.

At the very least, this casts a serious legal doubt over the legality of credit card sales, a doubt and uncertainty which is in itself discriminatory compared to clear legalities of credit card sales practiced and permitted by New York wineries.

Finally, given the overwhelming dominance of credit card sales in modern interstate selling, it is highly ironic that the practical effect of New York's credit card restrictions, which are integrated into the rest of the regulatory regime for wine sales, end up – if not disallowing the interstate commerce at issue – meaning that a non-New York winery will legally effectuate all or virtually all of its sales to New York customers from its *non*-New York-licensed winery premises in another, "foreign" state.

Is that still not discrimination enough, together with all of the preceding examples? If not, incredibly, the New York statutory scheme has yet more obstacles and burdens to offer "foreign" wineries from other States.

New York's credit card sale restrictions are probably fatal, practically speaking to non-New York wineries wishing to sell their valued products to willing New York consumers, a lethal discrimination. Again we must respectfully ask: Is this all not overwhelming, unconstitutional discrimination against citizens of other states of our Nation?

But before leaving the subject of the barriers facing non-New York wineries, it is important to emphasize that the postulated substitute for simply *equal rights* with native New York wineries, tendered by the State and accepted without much real-world scrutiny by the court

below, is a maze of laws and regulations filled with thick clouds overshadowing any firm rights. As stated before, New York's affiant admits that no out-of-state winery ever applied for the license he postulates. McKeon Aff. ¶43 (J.A. 159-60).[11] We respectfully submit that in the face of this plea for Constitutional rights, hints of possibilities do not substitute for legal rights. The strong challenge here based on fundamental rights of citizens of a nation cannot be satisfied with a prediction that certain commerce might be theoretically possible.

Even assuming *arguendo* that the untested assumption of possible licensing has any validity, we respectfully submit that it is inherently and materially discriminatory (a) that all that non-New York wineries can get is an exception based upon very delimited circumstances and requisites, (b) that out-of-staters are forced to crawl through complex exceptions or loopholes in order to do commerce, and (c) that the supposed alternatives proffered are actually under a great legal cloud of uncertainty, with the out-of-staters having to gamble that they will be permitted at the end of what is often a long regulatory road.

II. IN CONTRAST, NEW YORK ABC LAW DISCRIMINATORILY FAVORS NEW YORK WINERIES

This discrimination stands out even more upon a brief mention of the special legislative provisions which positively *favor* New York wineries.

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[11] We also know of no cases, and none have been cited, in which the provisions that New York posits have actually been recognized in practice and allowed to any non-New York winery by New York regulators.

The Special "Farm Winery" and "New York state labeled" Wine Exceptions

The Second Circuit recognized one, but only one area of privilege:

> Smaller New York wineries can obtain a farm winery license at a lower fee. N.Y. Alco. Bev. Cont. Law §76-a (McKinney 2000). A licensed farm winery can manufacture no more than 150,000 finished gallons of wine annually, id. §76-a(7), and must use New York-grown grapes or other fruits in the manufacturing process. Id. §76-a(5). Like other licensed wineries, a licensed farm winery may sell and ship its wine to a licensed winery, wholesaler or retailer, or directly to consumers. Id. §§76-a(3), (6)(d).

Id. at 228 n.2. Thus both farm wineries, and producers of New York state labeled wines, are favored.

In stark contrast, however, non-New York wineries cannot become New York "farm wineries" and thus cannot utilize the sales and shipping methods of farm wineries. Even according to the State, they can only become normal "commercial" wineries in New York. *See* ABC Law §§3(21-a), 76-a(5) & (7); McKeon Aff. ¶43 (J.A. 159-60). And "New York state labeled" wine is quite a term of art: it is strictly confined to "wine made from grapes, at least seventy-five percent *[75%] the volume* of which were *grown in New York state*." ABC Law §3(20-a). The practical consequence of this definition is that few if any non-New York wineries, especially West Coast wineries, could get enough New York grapes to make such wine. Even if they could, the discriminatory impact would just be shifted upstream to non-New York grape growers rather than to wineries.

We submit that these and other pro-New York winery special provisions magnify the discrimination complained of in this case. And these special privileges extend far beyond the "farm winery" exemption focused on by the Court below. So, for example, ABC Law §76(4) allows New York wineries to sell "New York state labeled" wines directly to New York consumers, a privilege barred to out-of-state wineries. Similarly, ABC Law §76(2)(a) permits direct sales of "New York state labeled" wines by New York wineries at wine tastings at those wineries. And ABC Law §77(5) grants to New York wineries the privilege of making Sunday sales by New York wineries of "New York state labeled" wines. Likewise, ABC Law §77(4)(b)(4) grants New York wineries the right to sell "New York state labeled" wines of other wineries, a right not granted to non-New York wineries. Further, ABC Law §76(5) enables New York wineries to make wine deliveries for other New York wineries, as well. As the legislative history shows, these provisions were adopted expressly to benefit New York wineries in response to "low cost foreign competition" (2d Cir. Jt. Appx. 300, 296-299, 301-305). Again, all the above privileges are denied to non-New York wineries, discriminatorily.

CONCLUSION

We have perhaps dragged the Court through a maze of discriminatory statutory provisions and, hopefully, indicated the palpable real-world discrimination the statutes inflict. The Second Circuit believed that such practical scrutiny was impermissible in the analysis; we submit that, on the contrary, it is indispensable if, as Justice Holmes and a unanimous Court were right that "Commerce" is a

"practical [concept], drawn from the course of business." *Swift & Co. v. United States*, 196 U.S. 375, 398-99 (1905).

We not only submit respectfully that real-world scrutiny is a must, but that discrimination against out-of-state citizens always demands strict scrutiny. Historically, the Prohibition Repeal Amendment surely was never meant to supersede the bedrock of freedom of National Commerce born with the Constitution. The opposite premise would in effect sanction in a material respect turning this Union back into a Confederacy. And it was doubtless no accident that the Prohibition Repeal Amendment itself was born of the same party platform and in the same era as unprecedented national government power – especially under the Commerce Clause. Preserving these rights, and the great principle of free National Commerce requires vigilance and strict scrutiny from this Honorable Court; as the Court observed in giving birth to the doctrine of strict scrutiny, *United States v. Carolene Products Co.*, 304 U.S. 144, 152 n.4 (1938),[12] it flows in part from the need to protect minorities

[12] Many scholars trace the philosophical birth of the Constitutional strict scrutiny doctrine to Justice Stone's famed footnote in *United States v. Carolene Products Co.*, 304 U.S. 144, 152 n.4 (1938). *Carolene Products* laid out three key factors making strict scrutiny necessary, one of which is "legislation which restricts those political processes which can ordinarily be expected to bring about repeal of undesirable legislation." Strict scrutiny was deemed necessary when the usual political processes could not wholly be counted on to repeal undesirable legislation. While the statute attacked does not insulate itself from repeal, the same concern – statutes insulated from political pressure for repeal by those affected – applies to discriminations against out-of-state residents, who are citizens of other states who will seldom if ever have the in-staters' influence for repeal – and never have the vote which in-staters can cast for candidates favoring repeal. *Amicus* respectfully submits that this need to strictly scrutinize statutes which can be insulated from normal pressures for repeal is always present when discriminatory state statutes collide with the dormant Commerce

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who cannot themselves prevent discrimination by "voting the rascals out" as it were, the position non-New York wineries are necessarily trapped in. Such scrutiny cannot sustain the discrimination, statutory and practical, inflicted by New York in this case.

Amicus Millbrook is interested in selling, and directly shipping, its fine wines to out-of-state wine lovers, many of whom desire to purchase them through direct orders. Current law deprives both non-New York wineries and New York wine lovers – and potentially all American wine lovers – opportunities to easily enjoy wines from everywhere in the Country. And, if New York opened direct shipping to non-New York wineries, then, through reciprocity provisions in other states, Millbrook and other wineries would be able to direct ship to such other states, further freeing national commerce in this area from discrimination. So, for all of the above reasons, *Amicus Curiae* Millbrook respectfully urges this Honorable Court to vacate the judgment of the court below and grant the relief sought herein by Petitioners.

Respectfully submitted,

ROBERT S. GETMAN
359 West 29th Street
New York, NY 10001
(212) 594-6732
Counsel for Amicus Curiae
Millbrook Vineyards & Winery

July 29, 2004

Clause, and thus this concern and its remedy of strict scrutiny trumps other sources of state power, even the 21st Amendment. Of course, in addition, weighty Constitutional considerations such as Plaintiff's rights under the Privileges and Immunities Clause and the Fourteenth Amendment also counterbalance 21st Amendment concerns herein.